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'08 CV 1442 BTM CAB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ENEDINO DURAN GOMEZ;
GERARDO DURAN TOVAR;
REYNALDO GALVAN; OSCAR
GARCIA-TOVAR; ZACARIAS
GUTIERREZ MILLA; ALVARO
JUAN JIMENEZ; ANTONIO
JIMENEZ; ANDRES MILLAN; JUAN
MILLAN-MARTINEZ; BENITO
ROJAS; RAFAEL VELAZQUEZ, and
a Class of similarly-situated employees
and participants,

Plaintiffs,

vs.

ROSSI CONCRETE, INC., a California
Corporation; JOSEPH JAMES ROSSI,
an individual; ROSSI CONCRETE,
INC. DEFINED BENEFIT PENSION
PLAN, an employee pension benefit
plan,

Defendants.

NO.

CLASS ACTION

COMPLAINT FOR:

(1) to (3) VIOLATIONS OF ERISA
FIDUCIARY DUTIES - PLANS 1, 2
AND 3 (29 U.S.C. § 1132(a)(2));
(4) FAILURE TO PROVIDE
INFORMATION TO ERISA
PARTICIPANTS (29 U.S.C. §
502(c)(1));
(5) VIOLATION OF ERISA
TERMINATION PROVISIONS (29
U.S.C. § 1370(a))
(6) FAIR LABOR STANDARDS ACT
(29 U.S.C. § 216(b))
(7) FAILURE TO PAY MINIMUM
WAGES AND OVERTIME (CA Labor
Code § 1194);
(8) UNLAWFUL DEDUCTIONS FROM
WAGES (CA Labor Code §§ 221-224,
1194);
(9) FAILURE TO PROVIDE REST
AND MEAL PERIODS (CA Labor Code
§§ 226.7 & 512);
(10) FAILURE TO PAY WAGES ON
TERMINATION (CA Labor Code § 203)
(11) CALIFORNIA UNFAIR
BUSINESS PRACTICES (CA Bus. &
Prof. Code § 17200)
[JURY DEMAND]

ORIGINAL

1 Plaintiffs complain and allege as follows:

2
3 [JURISDICTION AND VENUE]
4

5 1. This is an action by employees against their employer for breach of
6 fiduciary duties as to three benefit plans sponsored by the same employer, and for
7 violation of federal and state wage and hour laws. This Court has jurisdiction over
8 the First through Fifth Claims pursuant to the Employee Retirement Income Security
9 Act (ERISA) §§ 502 and 4070, 29 U.S.C. §§ 1132 and 1370. This Court has
10 jurisdiction over the Sixth Claim pursuant to the Fair Labor Standards Act (FLSA),
11 29 U.S.C. § 216(b). This Court has supplemental jurisdiction over the remaining
12 state claims pursuant to 28 U.S.C. § 1367(a) as arising from the same core facts,
13 namely the payroll practices of the employer. Venue is proper in this district as
14 defendants and plaintiffs all reside here, and the work took place within this district.
15

16 [PARTIES]
17

18 2. Named Plaintiff Enedino Duran Gomez (Gomez) was and is an
19 individual residing in the County of San Diego, State of California.
20

21 3. Named Plaintiff Gerardo Duran Tovar (Duran-Tovar) was and is an
22 individual residing in the County of San Diego, State of California.
23

24 4. Named Plaintiff Reynaldo Galvan (Galvan) was and is an individual
25 residing in the County of San Diego, State of California.
26

27 5. Named Plaintiff Oscar Garcia-Tovar (Garcia-Tovar) was and is an
28 individual residing in the County of San Diego, State of California.

1 6. Named Plaintiff Zacarias Gutierrez Milla (Milla) was and is an
2 individual residing in the County of San Diego, State of California.

3
4 7. Named Plaintiff Alvaro Juan Jimenez (Juan Jimenez) was and is an
5 individual residing in the County of San Diego, State of California.

6
7 8. Named Plaintiff Antonio Jimenez (Antonio Jimenez) was and is an
8 individual residing in the County of San Diego, State of California.

9
10 9. Named Plaintiff Andres Millan (Millan) was and is an individual
11 residing in the County of San Diego, State of California.

12
13 10. Named Plaintiff Juan Millan-Martinez (Millan-Martinez) was and is an
14 individual residing in the County of Riverside, State of California.

15
16 11. Named Plaintiff Benito Rojas (Rojas) was and is an individual residing
17 in the County of Riverside, State of California.

18
19 12. Named Plaintiff Rafael Velazquez (Velazquez) was and is an individual
20 residing in the County of San Diego, State of California.

21
22 13. Plaintiffs Gomez, Duran-Tovar, Galvan, Garcia-Tovar, Milla, Juan-
23 Jimenez, Antonio Jimenez, Millan, Millan-Martinez, Rojas and Velazquez shall be
24 referred to hereafter collectively as "Named Plaintiffs." Named Plaintiffs are each
25 employees, or former employees, of Defendant Rossi Concrete, Inc.

26
27 14. Defendant ROSSI CONCRETE, INC. (Employer) is a California
28 Corporation, licensed to do business in the State of California, with its principal

1 place of business in the County of San Diego, State of California.

2
3 15. Defendant JOSEPH JAMES ROSSI (Owner) is an individual residing
4 in San Diego County, California. Plaintiffs are informed and believe, and on that
5 basis allege, that Owner is the President and majority shareholder of Employer, and
6 is the Qualifying Officer on the contractor's license of Employer.

7
8 16. Defendant ROSSI CONCRETE, INC. DEFINED BENEFIT PENSION
9 PLAN (Plan 1) is an employee pension plan and employee benefit plan, as defined
10 by ERISA §§ 3(2) and 3(3), respectively, 29 U.S.C. §§ 1002(2) and 1002(3), and is a
11 "defined benefit plan" as defined in ERISA § 3(35), 29 U.S.C. § 1002(35).

12
13 17. Plaintiffs are informed and believe, and on that basis allege, that Owner
14 was personally responsible for devising and implementing the policies described in
15 this complaint, and therefore should be held personally liable for any liability as a
16 fiduciary of the employee benefit plans.

17
18 18. BENEFIT SYNERGY is a person or entity of unknown type. Benefit
19 Synergy is not registered in the State of California as a corporation, partnership or
20 fictitious business name. As far as plaintiffs can tell, "Benefit Synergy" does not
21 exist.

22
23 19. Plaintiffs are informed and believe, and on that basis allege, that the
24 ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO
25 CHAPTER, INC. (AGC), is a California non-profit corporation.

26 //

27 //

28 //

[CLASS ACTION ALLEGATIONS]

20. Named Plaintiffs propose to represent the following class, applicable to all claims, except the Fourth and Sixth Claims:

All current and former employees of Employer, who have performed construction work on public works for Employer within four years of the filing of this Complaint.

21. Named Plaintiffs propose the following sub-classes, applicable to specific claims:

SUBCLASS 1: Participants, or former participants within the last four years, of the employee benefit plan defined as PLAN 1 below. This subclass is applicable to the First and Fifth Claims. Named Plaintiffs Galvan and Millan-Martinez are proposed as representatives of this subclass.

SUBCLASS 2: Participants, or former participants within the last four years, of the employee benefit plan defined as PLAN 2 below. This subclass is applicable to the Second Claim only. Named Plaintiffs are informed and believe that they are participants, or former participants of the employee benefit plan defined as PLAN 2 and are proposed as representatives of this subclass.

SUBCLASS 3: Participants, or former participants within the last four years, of the employee benefit plan defined as PLAN 3 below. This subclass is applicable to the Third Claim only. Named Plaintiffs Galvan, Millan, Millan-Martinez, Rojas, and Velazquez are proposed as representatives of this subclass.

SUBCLASS 4: Those former employees in the Class who were terminated or left

1 employment before the filing of this lawsuit. This subclass is
2 applicable to the Tenth Claim only. Named Plaintiffs, Gomez,
3 Duran-Tovar, Antonio Jimenez, Galvan, Milla, Velazquez,
4 Millan, Millan-Martinez, and Rojas are proposed as
5 representatives of this subclass.
6

7 22. Plaintiffs are informed and believe that there are over 175 persons
8 within the proposed class, and at least 50 in each of the proposed subclasses.
9

10 23. Named Plaintiffs will fairly and adequately represent the interests of the
11 proposed class. Named Plaintiffs have claims typical of those of the proposed class,
12 and a vested interest in prosecuting those claims for the entire class. Named
13 Plaintiffs have retained counsel experienced in ERISA, wage & hour, and class
14 litigation, and propose the undersigned counsel as Class Counsel in this case.
15

16 24. The claims of the proposed class present common questions of fact and
17 law. The violations of law described in this complaint are the result of uniform
18 policies of the Employer toward all of its construction workers. For example, it
19 uniformly failed to fund contributions to its pension plans, on behalf of all
20 employees, contrary to the requirements of applicable prevailing wage regulations
21 as well as the written requirements of those plans. Each of the (insufficient)
22 contributions it did make were transmitted in a single report and a single check to
23 each Plan, as to all employees. Also, it is the policy of the Employer that all
24 employees in the Class described above are required to report to the Employer's
25 yard, ready to perform work there, but they are not compensated for that time, or
26 compensated at less than the prevailing wage rate. The Employer also maintains a
27 uniform policy regarding pay for traveling between the Employer's yard to the
28 jobsite, and back again. In particular, the Employer pays a flat rate, less than the

1 prevailing wage, for time traveling from the yard to the jobsite and back, rather than
2 the actual time worked. All issues of liability are common to all proposed class
3 members; only the calculation of damages varies by individual. Even in the
4 calculation of damages, the payroll records necessary to prove damages are
5 primarily kept in documents common to all class members.

6
7 25. The claims of the Named Plaintiffs are typical of those of the proposed
8 CLASS. Each of the Named Plaintiffs has suffered the deprivations described in
9 this complaint.

10
11 26. Class certification is appropriate under Rule 23(b)(1)(B) of the Federal
12 Rules of Civil Procedure, for SUBCLASSES 1 through 3, related to Claims 1
13 through 3, for violation of ERISA fiduciary duties, 29 U.S.C. §§ 1109(a) and
14 1132(a)(2), and to Claim 5 for violation of ERISA termination provisions, 29 U.S.C.
15 §§ 1341 and 1370. Prosecution of separate actions by individual members of these
16 subclasses would create a risk of adjudications with respect to individual members
17 of the class which would as a practical matter be dispositive of the interests of the
18 other members not parties to the adjudications or substantially impair or impede
19 their ability to protect their interests. These ERISA claims allow only for recovery
20 to the plan(s), not individual plaintiffs, so that plaintiffs seek an accounting and
21 recovery of a common fund as to these claims, which would benefit the entire
22 Subclass as to each Plan.

23
24 27. Class certification is appropriate under Rule 23(b)(3) of the Federal
25 Rules of Civil Procedure, as to all claims, except the Fourth and Sixth, in that
26 common questions of law and fact predominate over any questions affecting
27 individual members, so that a class action is appropriate under Rule 23(b)(3). These
28 claims all involve uniform policies of the Employer as to all members of the class.

1 For example, proof of both liability and damages will center on documents common
 2 to all class members, so that prosecution of separate individual actions will require
 3 the production of the same document many times, each time redacted to exclude
 4 private information of all but the individual plaintiff; whereas a class action will
 5 allow a single production of the documents, subject to an appropriate protective
 6 order to prevent public disclosure. Regarding the Seventh Claim in particular, it
 7 involves the same facts and thus the same evidence as the First through Third
 8 Claims, which are appropriate for class certification under Rule 23(b)(1)(B). Also,
 9 because of the ability of the Employer to intimidate and threaten individual
 10 employees, a class action is preferable to separate individual actions.

11
 12 28. Plaintiffs propose to give notice by mail to the last known address of
 13 each class member, which the Employer is required by law to maintain, on a form
 14 approved by the Court. Plaintiffs intend to pursue their own additional investigation
 15 to update those lists, and provide additional notice if necessary.

16
 17 [ALLEGATIONS COMMON TO ALL CLAIMS]
 18

19 29. The business of Employer is a construction contractor on public and
 20 private works projects in California.

21
 22 30. Among others, Employer has worked as a contractor on the following
 23 projects:

24
 25 Project Name

Public Agency

26
 27 #1852 San Elijo ES

San Marcos SD

1	Park Ave. Trolley	City of San Diego
2		
3	Ronald Reagan ES	Murrieta SD
4		
5	Caltrans District 11 Office Building	Cal Trans
6		
7	#1861 Louse Faussat Elementary	Oceanside-Carlsbad USD
8		
9	#1926 Chula Vista HS	Chula Vista SD
10		
11	Encinas Wastwater Authority O&M Facility	Carlsbad-Encinitas Wastwater
12		Authority
13		
14	#1933 Palm Desert MS	Palm Desert SD
15		
16	#1831 Cesar Chavez MS	Oceanside-Carlsbad USD
17		
18	Poinsettia ES	Oceanside-Carlsbad USD
19		
20	#1922 UCSD East Campus Housing	Regents of UC
21		
22		

23 The above projects, plus others to be discovered, are all "public works," as defined
24 in California Labor Code § 1720, on which the "prevailing wage" is required to be
25 paid all workers, pursuant to California Labor Code § 1771. These will be
26 collectively referred to here as "Prevailing Wage Projects."

27
28 31. The Employer sponsored the following three pension plans, which will

1 be referred to collectively here as "Plans":

2
3 Plan 1: ROSSI CONCRETE, INC. DEFINED BENEFIT PENSION PLAN

4 Plan 2: ROSSI CONCRETE, INC. PROFIT SHARING 401K PLAN

5 Plan 3: ROSSI CONCRETE, INC. 401K PSP

6 Each of the Plans is an employee pension plan and employee benefit plan, as defined
7 by ERISA §§ 3(2) and 3(3), respectively, 29 U.S.C. §§ 1002(2) and 1002(3).

8
9 32. Plan 1 is a "defined benefit plan" as defined in ERISA § 3(35), 29
10 U.S.C. § 1002(35). Owner is a Trustee, and thus fiduciary of Plan 1. Plan 1 is
11 administered by Employer and "Benefit Synergy."

12
13 33. Plan 2 is an "individual account plan" as defined in ERISA § 3(34), 29
14 U.S.C. § 1002(34). Owner is a Trustee, and thus a fiduciary of Plan 2. Plan 2 is
15 administered by Employer and "Benefit Synergy."

16
17 34. Plan 3 is an "individual account plan" as defined in ERISA § 3(34), 29
18 U.S.C. § 1002(34). Trustees of the AGC is the administrator of Plan 3.

19
20 35. Named Plaintiffs Galvan and Millan-Martinez are participants of Plan
21 1, or have a bona fide claim to future benefits from this Plan.

22
23 36. Named Plaintiffs are informed and believe that they are participants of
24 Plan 2, or have a bona fide claim to future benefits from this Plan.

25
26 37. Named Plaintiffs, Galvan, Millan, Millan-Martinez, Velazquez, and
27 Rojas, are participants of Plan 3, or have a bona fide claim to future benefits from
28 this Plan.

1 38. The Employer claims credit for contributions to the Plans towards its
2 obligation to meet the minimum prevailing wage on the Prevailing Wage Projects.

3
4 39. The Employer has had the following consistent policies and practices,
5 as to all employees performing construction work over the last four years, and
6 continues these practices:

7 a. The Employer has not paid the Plans the amount it claims as
8 credit towards prevailing wages on the Prevailing Wage Projects, and it
9 claims amounts deducted from employee pay as an employer contribution;

10 b. The Employer failed to pay the contributions required by each of
11 the Plans on behalf of its employees;

12 c. Employer did not pay its employees the required prevailing wage
13 rates for work on Prevailing Wage Projects;

14 d. Employer failed to pay its employees for all hours worked,
15 specifically including the time from when employees were required to report
16 to the Employer's yard to when they arrived at the jobsite.

17 e. Employer failed to pay for work performed after eight in a day or
18 after forty in a week, at the appropriate overtime rates;

19 f. Employer did not authorize or permit its employees their required
20 rest and meal periods;

21 g. Employer deducted money from employee pay for the purchase
22 and maintenance of uniforms it required on the job;

23 h. Employer failed to pay employees whose employment ceased, all
24 wages due them within the time required by law.

25
26
27 40. All of the above practices and procedures have been done under the
28 specific direction and control of Owner. Plaintiffs are informed and believe and on

1 that basis allege, that Owner diverted the funds illegally derived from the above
2 practices to his own personal use, and to hide those funds from his creditors.

3
4 FIRST CLAIM FOR RELIEF

5 Violation of ERISA Fiduciary Duties as to Plan 1

6 Against Defendants Employer and Owner

7 [ERISA §§ 409 and 502(a)(2); 29 U.S.C. §§ 1109 and 1132(a)(2)]
8

9 41. Plaintiffs incorporate all prior allegations, and all allegations in
10 subsequent Claims. Unless specified otherwise, all allegations as to the "Plan" in
11 this Claim refers to Plan 1, described above.

12
13 42. The Owner is a fiduciary as to the Plan, as defined in ERISA §
14 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he is designated as the Trustee of the
15 Plan, with authority over its assets and operations.

16
17 43. The Employer and Owner have exercised and continue to exercise
18 authority and control over the management and disposition of the assets of the Plan.
19 The Employer exercises control over these assets in that it kept required
20 contributions owed the Plan in its own accounts, rather than pay them over to the
21 Plan, and/or used the assets for other purposes. The Owner exercised control over
22 these assets in that he was the one with authority to write (or not write) checks from
23 the Employer accounts where the assets were kept, he was the one with the final
24 authority to decide whether the funds would be paid to the Plan or used for some
25 other purpose, and he was the one who directed that the assets be kept or used for
26 other purposes rather than sent to the Plan. The Employer and Owner are therefore
27 each fiduciaries as to the Plan in their authority and control of those Plan assets, as
28 described in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

1 44. The Employer and Owner have failed to pay over to the Plan the
2 required contributions in their possession and control, but have instead kept those
3 contributions in their own accounts, and mis-stated the amount of contributions
4 owed. By failing to turn over the contributions owed on the Employees' behalf to
5 the Plan, the Employer and the Owner have violated their fiduciary duties as to the
6 Plan, under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

7
8 45. The Employer and Owner have retained the services of "Benefit
9 Synergy" for administration of the Plan, and have paid "Benefit Synergy" from Plan
10 assets. However, "Benefit Synergy" is not a legal entity, so that Employer and
11 Owner have failed to administer the Plan in a prudent manner, and have risked loss
12 to the Plan. This failure to make sure that the Plan is administered properly by a
13 legal entity, and paying "Benefit Synergy" for services it cannot perform, is a breach
14 of Employer and Owner's fiduciary duties as to the Plan, under ERISA §
15 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

16
17 46. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), the Employer and
18 Owner are personally liable for the loss to the Plan resulting from their fiduciary
19 breach, and may be subject to such other equitable or remedial relief to restore the
20 Plan.

21
22 47. The Named Plaintiffs and the class they represent, as participants in the
23 Plan, seek appropriate relief to remedy these breaches of fiduciary duty, under
24 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Specifically, plaintiffs ask this Court
25 to:

26
27 a. Order an accounting of the contributions which should have been paid
28 into the Plan, all funds owing to the Plan, and all funds actually paid to the

1 Plan;

2 b. Order an accounting of all payments made to "Benefit Synergy," to the
3 Employer or to the Owner;

4 b. Hold the Employer and Owner, and each of them, personally liable,
5 jointly and severally with each other, for the losses to the Plan, in an amount
6 to be determined;

7 c. Place a constructive trust on the Plan assets found to be in the control of
8 the Employer and/or Owner;

9 d. Such other equitable relief as this Court deems just and proper.

10
11 48. Plaintiffs have been required to engage legal counsel to bring this
12 action. Plaintiffs are entitled to an award of their reasonable fees and costs, pursuant
13 to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), in addition to any other remedy or
14 recovery.

15
16
17 SECOND CLAIM FOR RELIEF

18 Violation of ERISA Fiduciary Duties as to Plan 2

19 Against Defendants Employer and Owner

20 [ERISA §§ 409 and 502(a)(2); 29 U.S.C. §§ 1109 and 1132(a)(2)]

21
22 49. Plaintiffs incorporate all prior allegations, and all allegations in
23 subsequent Claims. Unless specified otherwise, all allegations as to the "Plan" in
24 this Claim refers to Plan 2, described above.

25
26 50. The Owner is a fiduciary as to the Plan, as defined in ERISA §
27 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he is designated as the Trustee of the
28 Plan, with authority over its assets and operations.

1 51. The Employer and Owner have exercised and continue to exercise
2 authority and control over the management and disposition of the assets of the Plan.
3 The Employer exercises control over these assets in that it kept required
4 contributions owed the Plan (including contributions deducted from employee pay)
5 in its own accounts, rather than pay them over to the Plan, and/or used the assets for
6 other purposes. The Owner exercised control over these assets in that he was the
7 one with authority to write (or not write) checks from the Employer accounts where
8 the assets were kept, he was the one with the final authority to decide whether the
9 funds would be paid to the Plan or used for some other purpose, and he was the one
10 who directed that the assets be kept or used for other purposes rather than sent to the
11 Plan. The Employer and Owner are therefore each fiduciaries as to the Plan in their
12 authority and control of those Plan assets, as described in ERISA § 3(21)(A), 29
13 U.S.C. § 1002(21)(A).

14
15 52. The Employer and Owner have failed to pay over to the Plan the
16 required contributions in their possession and control, including amounts deducted
17 from employee pay and held in the Employer's payroll account, but have instead
18 kept those contributions in their own accounts, and mis-stated the amount of
19 contributions owed. By failing to turn over the contributions owed on the
20 Employees' behalf to the Plan, the Employer and the Owner have violated their
21 fiduciary duties as to the Plan, under ERISA § 404(a)(1)(A), 29 U.S.C. §
22 1104(a)(1)(A).

23
24 53. The Employer and Owner have retained the services of "Benefit
25 Synergy" for administration of the Plan, and have paid "Benefit Synergy" from Plan
26 assets. However, "Benefit Synergy" is not a legal entity, so that Employer and
27 Owner have failed to administer the Plan in a prudent manner, and have risked loss
28 to the Plan. This failure to make sure that the Plan is administered properly by a

1 legal entity, and paying "Benefit Synergy" for services it cannot perform, is a breach
2 of Employer and Owner's fiduciary duties as to the Plan, under ERISA §
3 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

4
5 54. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), the Employer and
6 Owner are personally liable for the loss to the Plan resulting from their fiduciary
7 breach, and may be subject to such other equitable or remedial relief to restore the
8 Plan.

9
10 55. The Named Plaintiffs and the class they represent, as participants in the
11 Plan, seek appropriate relief to remedy these breaches of fiduciary duty, under
12 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Specifically, plaintiffs ask this Court
13 to:

14
15 a. Order an accounting of the contributions which should have been paid
16 into the Plan (including all amounts deducted from employee pay), all funds
17 owing to the Plan, and all funds actually paid to the Plan;

18 b. Order an accounting of all payments made to "Benefit Synergy" to the
19 Employer or to the Owner;

20 c. Hold the Employer and Owner, and each of them, personally liable,
21 jointly and severally with each other, for the losses to the Plan, in an amount
22 to be determined;

23 d. Place a constructive trust on the Plan assets found to be in the control of
24 the Employer and/or Owner;

25 e. Such other equitable relief as this Court deems just and proper.

26
27 56. Plaintiffs have been required to engage legal counsel to bring this
28 action. Plaintiffs are entitled to an award of their reasonable fees and costs, pursuant

1 to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), in addition to any other remedy or
2 recovery.

3
4 THIRD CLAIM FOR RELIEF

5 Violation of ERISA Fiduciary Duties as to Plan 3

6 Against Defendants Employer and Owner

7 [ERISA §§ 409 and 502(a)(2); 29 U.S.C. §§ 1109 and 1132(a)(2)]
8

9 57. Plaintiffs incorporate all prior allegations, and all allegations in
10 subsequent Claims. Unless specified otherwise, all allegations as to the "Plan" in
11 this Claim refers to Plan 3, described above.
12

13 58. The Employer and Owner have exercised and continue to exercise
14 authority and control over the management and disposition of these assets of the
15 Plan. The Employer exercises control over these assets in that it kept required
16 contributions owed the Plan in its own accounts, rather than pay them over to the
17 Plan, and/or used the assets for other purposes. The Owner exercised control over
18 these assets in that he was the one with authority to write (or not write) checks from
19 the Employer accounts where the assets were kept, he was the one with the final
20 authority to decide whether the funds would be paid to the Plan or used for some
21 other purpose, and he was the one who directed that the assets be kept or used for
22 other purposes rather than sent to the Plan. The Employer and Owner are therefore
23 each fiduciaries as to the Plan in their authority and control of those Plan assets, as
24 described in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
25

26 59. The Employer and Owner have failed to pay over to the Plan the
27 required contributions in their possession and control, but have instead kept those
28 contributions in their own accounts, and mis-stated the amount of contributions

1 owed. By failing to turn over the contributions owed on the Employees' behalf to
2 the Plan, the Employer and the Owner have violated their fiduciary duties as to the
3 Plan, under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

4
5 60. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), the Employer and
6 Owner are personally liable for the loss to the Plan resulting from their fiduciary
7 breach, and may be subject to such other equitable or remedial relief to restore the
8 Plan.

9
10 61. The Named Plaintiffs and the class they represent, as participants in the
11 Plan, seek appropriate relief to remedy this breach of fiduciary duty, under ERISA §
12 502(a)(2), 29 U.S.C. § 1132(a)(2). Specifically, plaintiffs ask this Court to:

- 13
14 a. Order an accounting of the contributions which should have been paid
15 into the Plan, all funds owing to the Plan, and all funds actually paid to the
16 Plan;
17 b. Hold the Employer and Owner, and each of them, personally liable,
18 jointly and severally with each other, for the losses to the Plan, in an amount
19 to be determined;
20 c. Place a constructive trust on the Plan assets found to be in the control of
21 the Employer and/or Owner;
22 d. Such other equitable relief as this Court deems just and proper.

23
24 62. Plaintiffs have been required to engage legal counsel to bring this
25 action. Plaintiffs are entitled to an award of their reasonable fees and costs, pursuant
26 to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), in addition to any other remedy or
27 recovery.
28

FOURTH CLAIM FOR RELIEF

Failure to Provide Information Required by ERISA

As to Plans 1 and 2

By Named Plaintiffs only, Against Defendant Employer

[ERISA §§ 104(b)(4) and 502(c)(1)(B), 29 U.S.C. §§ 1024(b)(4) and 1132(c)(1)(B)]

63. Plaintiffs incorporate all prior allegations, and all allegations in subsequent Claims.

64. Pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), the Employer, as Administrator of Plan 1 and Plan 2, is required, "upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."

65. Named Plaintiffs Galvan, Millan, Gonzalez, and Millan-Martinez, did make such written requests to Employer, as to Plan 1 and to Plan 2, by letter from their authorized attorney, dated December 21, 2007 and mailed on or about the same date. Named Plaintiff Velazquez made such written requests to Employer, as to Plan 1 and to Plan 2, by letter from their authorized attorney dated January 3, 2008 and mailed on or about the same date.

66. The Employer did not respond to these written requests within 30 days, as required by ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B). Plaintiffs' attorneys sent several follow-up letters, on January 28, 2008, January 29, 2008, February 21, 2008 and March 17, 2008 both to the Employer and to "Benefit Synergy."

1 67. The Employer did not respond at all, until March 6, 2008, when it sent
2 a letter, claiming that it was gathering the requested documents. The Employer did
3 not produce any documents at all, until March 27, 2008. The documents it produced
4 on that date were not responsive to the request. To date, the Employer has failed to
5 produce the documents requested, as required by ERISA and applicable regulations.

6
7 68. Pursuant to ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), the
8 Employer's failure to provide the information requested means that it may "be
9 personally liable to such participant or beneficiary in the amount of up to \$100 a day
10 from the date of such failure or refusal, and the court may in its discretion order such
11 other relief as it deems proper. . . . each violation . . . with respect to any single
12 participant or beneficiary, shall be treated as a separate violation."

13
14 69. Pursuant to ERISA § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A),
15 Plaintiffs have standing to bring this Claim to enforce ERISA § 502(c)(1)(B), 29
16 U.S.C. § 1132(c)(1)(B).

17
18 70. The Employer should be enjoined to provide to Plaintiffs ALL the
19 documents requested in their letters of December 21, 2007 for Plaintiffs Galvan,
20 Millan, Gonzalez, Millan-Martinez, and Gonzalez, and January 3, 2008 for Plaintiff
21 Velazquez.

22
23 71. The Employer should be liable to each Plaintiff, not only for the \$100
24 per day penalty of ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), but also for
25 attorney fees and costs of suit, pursuant to ERISA § 502(g)(1), 29 U.S.C. §
26 1132(g)(1).

27 //

28 //

FIFTH CLAIM FOR RELIEF
VIOLATION OF ERISA PLAN TERMINATION PROVISIONS

By Named Plaintiffs Millan-Martinez and Galvan

Against Employer, Owner and Plan 1

[ERISA, 29 U.S.C. §§ 1341 and 1370]

72. Plaintiffs incorporate all prior allegations, and all allegations in subsequent Claims.

73. Employer and Owner are purporting to terminate Plan 1. On about December 3, 2007, Plan 1 sent a Notice of Termination to the Pension Benefit Guarantee Corporation (PBGC). The PBGC received the notice on December 5, 2007, and assigned it PBGC Case No. 21119800. The Termination Notice proposed to terminate Plan 1 as of August 15, 2007.

74. Participants and beneficiaries did not receive a notice of intent to terminate at least sixty days before the proposed termination date, as required by 29 U.S.C. § 1341(a)(2).

75. Plaintiffs Millan-Martinez and Galvan did not receive any notice of the termination at all, until a letter dated October 3, 2007, entitled "Notice of Plan Benefits." This document was in English only. The primary language of Millan-Martinez and Galvan, as well as most of SUBCLASS 1, is Spanish, not English.

76. The notice given to Plaintiffs and other participants, was not "written in such manner as is likely to be understood by the participant or beneficiary" as required by 29 U.S.C. § 1341, and regulations thereunder.

1 77. The Termination Notice sent to the PBGC did not reveal or account for
2 the failure to fund and the failure to provide credits to employees in Plan 1, as
3 alleged in the First Claim. Plaintiffs are informed and believe, and on that basis
4 allege, that it is the intent of the Employer and Owner to thereby retain the funds
5 which should have been given to Plan 1, and avoid revealing the deficiency of assets
6 by understating the liabilities of Plan 1.

7
8 78. Plaintiffs are informed and believe that the Termination Notice sent to
9 the PBGC generally fails to account for all assets and liabilities of Plan 1.

10
11 79. Plaintiffs Millan-Martinez and Galvan are participants and/or
12 beneficiaries adversely affected by these violations of ERISA termination
13 provisions, in that they were not given proper notice and may have their
14 distributions understated. They therefore have standing, on their own and as
15 representatives of SUBLCASS 1, to seek appropriate relief pursuant to 29 U.S.C. §
16 1370(a).

17
18 80. Plaintiffs seek an order of this Court for an accounting of all assets and
19 liabilities of Plan 1, including all transactions between the Plan, Employer, Owner
20 and "Benefit Synergy" and all credit for benefits which Plaintiffs and members of
21 SUBCLASS 1 may be entitled.

22
23 81. Plaintiffs seek an order of this Court voiding the proposed termination,
24 and not allowing Plan 1 to be terminated until the accounting described above has
25 been completed, and any assets belonging to Plan 1 returned, and until the proper
26 notices have been given, in accordance with 29 U.S.C. § 1341(a).

27
28 82. Plaintiffs are entitled to an award of fees and costs, pursuant to 29

1 U.S.C. § 1370(e).

2
3
4 SIXTH CLAIM FOR RELIEF
5 FAIR LABOR STANDARDS ACT
6 AGAINST EMPLOYER
7 [29 U.S.C. § 216(b)]
8

9 83. Plaintiffs incorporate all prior allegations, and all allegations in
10 subsequent Claims.
11

12 84. The Employer failed to pay for all hours worked (including time
13 required to be spent at the Employer's yard and traveling to the jobsite), and failed
14 to pay overtime at the rate of one-and-one-half the required rate, for hours worked in
15 excess of forty per week.
16

17 85. The failure of the Employer to pay Employees one-and-one-half their
18 regular rate of pay for hours worked in excess of forty per week, is a violation of the
19 overtime provisions of 29 U.S.C. §§ 207(a)(1) and 215(a)(2).
20

21 86. Pursuant to 29 U.S.C. § 216(b), the Employees are entitled to recover
22 their unpaid overtime pay, plus liquidated damages equal to the amount of unpaid
23 overtime wages.
24

25 87. Pursuant to 29 U.S.C. § 216(b), other employees may "opt-in" to be
26 included in this claim. Named Plaintiffs will make an appropriate motion for an
27 order governing notice and the procedure for opting-in to this claim.
28

1 88. Pursuant to 29 U.S.C. § 216(b), plaintiffs are entitled to recover a
2 reasonable amount of attorney fees, and costs incurred in this action.

3
4 SEVENTH CLAIM FOR RELIEF
5 FAILURE TO PAY MINIMUM AND OVERTIME WAGES
6 AGAINST EMPLOYER
7 [CA Labor Code § 1194]
8

9 89. Plaintiffs incorporate all prior allegations, and all allegations in
10 subsequent Claims.

11
12 90. For work on Prevailing Wage Projects, Defendant Employer was
13 required to pay its employees not less than the prevailing wage rate as determined
14 under California Labor Code § 1773.1, for the classification of work performed.
15 Pursuant to California Labor Code §§ 1771 and 1774, the prevailing wage rates set
16 the minimum wage that Defendant Employer could pay its employees for work on
17 Prevailing Wage Projects.

18
19 91. Defendant Employer did not pay Plaintiffs and its other employees the
20 proper and required prevailing wage rate for their work on Prevailing Wage
21 Projects. These were not isolated discrepancies in pay, but reflect a consistent and
22 institutional policy of the Employer to pay at a rate less than the prevailing wage. In
23 particular, the Employer purported to meet part of its prevailing wage obligation
24 through the provision of fringe benefits, including payments to Plans 1, 2 and 3;
25 however it did not pay into those Plans and other benefits the amount it claimed
26 towards prevailing wages.

27
28 92. Defendant Employer did not pay Plaintiffs and its other employees for

1 all hours worked, and did not pay overtime at the rate of one-and-one-half the
2 regular rate, for hours worked in excess of eight in a day or forty in a week.

3
4 93. Pursuant to California Labor Code §§ 510, 1810-11, 1815 and Wage
5 Order 16-2001 of the Industrial Welfare Commission, "Any work in excess of eight
6 hours in one workday and any work in excess of 40 hours in any one workweek and
7 the first eight hours worked on the seventh day of work in any one workweek shall
8 be compensated at the rate of no less than one and one-half times the regular rate of
9 pay for an employee. Any work in excess of 12 hours in one day shall be
10 compensated at the rate of no less than twice the regular rate of pay for an employee.
11 In addition, any work in excess of eight hours on any seventh day of a workweek
12 shall be compensated at the rate of no less than twice the regular rate of pay of an
13 employee."

14
15 94. Pursuant to California Labor Code § 1194, Plaintiffs, individually and
16 on behalf of employees similarly situated, are entitled to the balance of the full
17 amount of minimum prevailing wages and overtime wages owed them, calculated at
18 the proper rate, together with interest from the date those wages were due.

19
20 95. Pursuant to California Labor Code § 1194.2, Plaintiffs, individually and
21 on behalf of employees similarly situated, are entitled to recover liquidated damages
22 in an amount equal to the minimum wages unpaid, in addition to the amount alleged
23 above.

24
25 96. Pursuant to California Labor Code § 1194(a), Plaintiffs are entitled to
26 recover their reasonable attorney fees and costs.

EIGHTH CLAIM FOR RELIEF
UNAUTHORIZED DEDUCTIONS FROM PAY
AGAINST EMPLOYER AND OWNER
[CA Labor Code §§ 221-224, 1194]

97. Plaintiffs incorporate all prior allegations, and all allegations in subsequent Claims.

98. As a general practice applicable to all field employees, Employer required all field employees to have uniforms, and required employees to purchase and maintain those uniforms at their own expense.

99. As a general practice applicable to all field employees, the Employer deducted the purchase or replacement price of the uniform from all employees, and additionally deducted approximately \$6.00 per week for maintenance of those uniforms. Usually, those deductions were not authorized in writing by employees.

100. Those deductions which were not authorized in writing were in violation of California Labor Code §§ 221 through 224. Plaintiffs are informed and believe that unauthorized deductions were made for other purposes as well.

101. All deductions for purchase, replacement or maintenance of uniforms, whether authorized or not, were in violation of the applicable IWC Wage Order 16-2001, which requires the employer to pay for the cost of required uniforms. This requirement of the IWC Wage Order is a legal minimum wage, which may not be reduced by the Employer, and is enforceable through Labor Code § 1194.

102. Pursuant to California Labor Code § 1194, Plaintiffs, individually and

1 on behalf of employees similarly situated, are entitled to recover the amount
2 unlawfully deducted for uniforms or for other purposes, together with interest from
3 the date those wages were due.

4
5 103. Pursuant to California Labor Code § 1194.2, Plaintiffs, individually and
6 on behalf of employees similarly situated, are entitled to recover liquidated damages
7 in an amount equal to the amount unlawfully deducted for uniforms or for other
8 purposes, in addition to the amount alleged above.

9
10 104. Pursuant to California Labor Code § 1194(a), Plaintiffs are entitled to
11 recover their reasonable attorney fees and costs.

12
13
14 NINTH CLAIM FOR RELIEF
15 FAILURE TO PROVIDE MEAL AND REST PERIODS
16 AGAINST EMPLOYER
17 [CA Labor Code §§ 512 and 226.7]
18

19 105. Plaintiffs incorporate all prior allegations, and all allegations in
20 subsequent Claims.

21
22 106. California law, as set forth in California Labor Code § 512 and
23 Industrial Welfare Commission Order No. 16-2001, and any successor Wage Orders,
24 requires the Employer to provide a 30 minute meal period for every five hours of
25 continuous work in a day, plus a rest period of 10 minutes for every four hours of
26 continuous work in a day.

27
28 107. As a regular practice of the Employer, employees were not permitted to

1 take their required rest periods, and were often not allowed to take a meal period
2 either.

3
4 108. Pursuant to California Labor Code sections 226.7 and 512(a), Plaintiffs,
5 individually and on behalf of employees similarly situated, are entitled to recover
6 one hour of pay for each meal or rest period which they were not allowed to take.

7
8
9
10 TENTH CLAIM FOR RELIEF
11 FAILURE TO PAY WAGES UPON TERMINATION
12 AGAINST EMPLOYER
13 [CA Labor Code § 203]
14

15 109. Plaintiffs incorporate all prior allegations, and all allegations in
16 subsequent Claims.

17
18 110. This claim is brought by Named Plaintiffs , for themselves, and the
19 subclass of former employees who were terminated or left employment before this
20 lawsuit was filed (Terminated Employees), and not by the other Named Plaintiffs or
21 on behalf of the class outside this subclass.

22
23 111. California Labor Code section 203 requires every employer to pay an
24 employee whose employment has ceased all wages owed to the employee at stated
25 periods of time, in no event later than 72 hours after the employment has ended.

26
27 112. The Terminated Employees were not paid all of the wages due them
28 upon termination, or within 72 hours, as described in the previous allegations.

1 Defendant Employer's failure to pay said wages on time or at all was willful within
2 the meaning of Labor Code section 203.

3
4 113. Each of the Terminated Employees is entitled to one day's wages for
5 each day he or she was not timely paid all wages due on and after the end of his or
6 her employment, up to a maximum of 30 days' wages.

7
8
9 ELEVENTH CLAIM FOR RELIEF
10 UNFAIR BUSINESS PRACTICES
11 AGAINST EMPLOYER AND OWNER
12 [Business and Professions Code § 17200 et seq.]
13

14 114. Plaintiffs incorporate all prior allegations, and all allegations in
15 subsequent Claims.

16
17 115. The failures to pay minimum, overtime and other wages, and the other
18 conduct of Employer described above constitute unlawful, unfair and fraudulent
19 business acts and practices, and unfair competition, within the meaning of California
20 Business & Professions Code § 17200. By failing to pay the full amount due its
21 employees, the Employer has gained an illegal and unfair advantage over its
22 employees, and over its competitors who obey the law.

23
24 116. Plaintiffs are informed and believe, and on that basis allege, that Owner
25 was personally responsible for devising and implementing the policies described in
26 this complaint, that he personally controlled the payments to and from the Employer,
27 that he failed to observe the corporate formalities of the Employer, for the purpose
28 of defrauding creditors such as Plaintiffs, and therefore should be held personally

1 liable for the unfair business practices alleged here.
2

3 117. Pursuant to California Business & Professions Code §§ 17203 and
4 17204, the Named Plaintiffs have standing to bring this claim, to remedy the harm
5 to them and in the interest of the public.
6

7 118. Named Plaintiffs seek preliminary and permanent injunctive relief,
8 requiring the Employer to pay its employees according to law.
9

10 119. Named Plaintiffs seek restitution of the amounts gained by Employer
11 and Owner, through their Unfair Business Practices, on behalf of themselves and
12 other employees similarly situated.
13

14 120. Plaintiffs are entitled to recover attorney fees and costs for bringing this
15 claim, pursuant to California Code of Civil Procedure § 1021.5.
16
17

18 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:
19

20 I. ON THE FIRST CLAIM FOR RELIEF, AGAINST EMPLOYER AND OWNER,
21 JOINTLY AND SEVERALLY:
22

23 A. Personal liability for the loss to the Plan resulting from their fiduciary
24 breaches, pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).
25

26 B. Equitable and injunctive relief, pursuant to ERISA § 502(a)(2), 29 U.S.C.
27 § 1132(a)(2), including but not limited to the following:
28

1. Order an accounting of the contributions which should have been paid into the Plan, all funds owing to the Plan, and all funds actually paid to the Plan;
2. Order an accounting of all payments made to "Benefit Synergy," to the Employer or to the Owner;
3. Place a constructive trust on the Plan assets found to be in the control of the Employer and/or Owner;
4. Such other equitable relief as this Court deems just and proper.

C. For attorney fees and costs of suit, pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1); and

D. For such further relief as this Court deems just and proper.

II. ON THE SECOND CLAIM FOR RELIEF, AGAINST EMPLOYER AND OWNER, JOINTLY AND SEVERALLY:

A. Personal liability for the loss to the Plan resulting from their fiduciary breaches, pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

B. Equitable and injunctive relief, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), including but not limited to the following:

1. Order an accounting of the contributions which should have been paid into the Plan, all funds owing to the Plan, and all funds actually paid to the Plan;
2. Order an accounting of all payments made to "Benefit Synergy," to the Employer or to the Owner;

1 3. Place a constructive trust on the Plan assets found to be in the control of
2 the Employer and/or Owner;

3 4. Such other equitable relief as this Court deems just and proper.
4

5 C. For attorney fees and costs of suit, pursuant to ERISA § 502(g)(1), 29
6 U.S.C. § 1132(g)(1); and
7

8 D. For such further relief as this Court deems just and proper.
9

10 III. ON THE THIRD CLAIM FOR RELIEF, AGAINST EMPLOYER AND
11 OWNER, JOINTLY AND SEVERALLY:
12

13 A. Personal liability for the loss to the Plan resulting from their fiduciary
14 breaches, pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).
15

16 B. Equitable and injunctive relief, pursuant to ERISA § 502(a)(2), 29 U.S.C.
17 § 1132(a)(2), including but not limited to the following:
18

19 1. Order an accounting of the contributions which should have been paid
20 into the Plan, all funds owing to the Plan, and all funds actually paid to the
21 Plan;

22 2. Place a constructive trust on the Plan assets found to be in the control of
23 the Employer and/or Owner;

24 3. Such other equitable relief as this Court deems just and proper.
25

26 C. For attorney fees and costs of suit, pursuant to ERISA § 502(g)(1), 29
27 U.S.C. § 1132(g)(1); and
28

1 D. For such further relief as this Court deems just and proper.

2
3 IV. ON THE FOURTH CLAIM FOR RELIEF, AGAINST EMPLOYER, ON
4 BEHALF OF NAMED PLAINTIFFS GALVAN, MILLAN, GONZALEZ,
5 MILLAN-MARTINEZ, AND VELAZQUEZ.

6
7 A. An injunction requiring the Employer to provide to Plaintiffs ALL the
8 documents requested in their letters of December 21, 2007 for Galvan, Millan,
9 Gonzalez, and Millan-Martinez and January 3, 2008 for Velazquez;

10
11 B. Judgment in the amount of \$100 per day, per Plaintiff, per Plan, from
12 January 31, 2008 until the date this Complaint is filed for Galvan, Millan, Gonzalez,
13 and Millan Martinez, and from February 3, 2008 until the date this Complaint is
14 filed for Velazquez, pursuant to ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B);

15
16 C. For attorney fees and costs of suit, pursuant to ERISA § 502(g)(1), 29
17 U.S.C. § 1132(g)(1); and

18
19 D. For such further relief as this Court deems just and proper.

20
21 V. ON THE FIFTH CLAIM FOR RELIEF, AGAINST PLAN 1, THE EMPLOYER
22 AND OWNER:

23
24 A. For an Order requiring an accounting of all assets and liabilities of
25 Plan 1, including all transactions between the Plan, Employer, Owner and "Benefit
26 Synergy" and all credit for benefits which Plaintiffs and members of SUBCLASS 1
27 may be entitled, pursuant to the equitable power of this Court under 29 U.S.C. §
28 1370(a)(2);

1 B. For an injunction, pursuant to 29 U.S.C. § 1370(a)(1) voiding the
2 proposed termination, and not allowing Plan 1 to be terminated until the accounting
3 described above has been completed, and any assets belonging to Plan 1 returned,
4 and until the proper notices have been given, in accordance with 29 U.S.C. §
5 1341(a);

6
7 C. For an award of attorney fees and costs, pursuant to 29 U.S.C. §
8 1370(e); and

9
10 D. For such further relief as this Court deems just and proper.
11
12

13 VI. ON THE SIXTH CLAIM FOR RELIEF, AGAINST EMPLOYER:
14

15 A. For all weekly overtime compensation due and unpaid, as shown by proof
16 at trial;
17

18 B. For liquidated damages, in an amount equal to the unpaid overtime pay,
19 pursuant to 29 U.S.C. § 216(b);
20

21 C. For fees and costs of suit, pursuant to 29 U.S.C. § 216(b); and
22

23 D. For such further relief as this Court deems just and proper.
24
25

26 VII. ON THE SEVENTH CLAIM FOR RELIEF, AGAINST EMPLOYER:
27

28 A. Judgment for the full amount of the minimum and prevailing wages owed

1 them, according to proof at trial;

2
3 B. Judgment for the full amount of daily and weekly overtime wages owed at
4 the correct rate, according to proof at trial;

5
6 B. Interest on the unpaid minimum and prevailing wages, and the unpaid
7 overtime, from the dates each was due, pursuant to Labor Code § 1194;

8
9 C. Liquidated damages in an amount equal to the minimum wages unpaid, in
10 addition to the amount alleged above, pursuant to California Labor Code § 1194.2;

11
12 D. Reasonable attorney fees and costs pursuant to California Labor Code §
13 1194(a); and

14
15 E. For such further relief as this Court deems just and proper.

16
17 VIII. ON THE EIGHTH CLAIM FOR RELIEF, AGAINST EMPLOYER:

18
19 A. Judgment for the amount of wages unlawfully deducted for uniforms or
20 other purposes, according to proof at trial;

21
22 B. Interest on the amount unlawfully deducted, from the dates each was
23 deducted, pursuant to Labor Code § 1194;

24
25 C. Liquidated damages in an amount equal to the unlawful deductions, in
26 addition to the amount alleged above, pursuant to California Labor Code § 1194.2;

27
28 D. Reasonable attorney fees and costs pursuant to California Labor Code §

1 1194(a); and

2
3 E. For such further relief as this Court deems just and proper.
4
5

6 IX. ON THE NINTH CLAIM FOR RELIEF, AGAINST EMPLOYER:
7

8 A. Judgment in the amount of one hour of pay for each meal or rest period
9 which they were not allowed to take, according to proof, pursuant to California
10 Labor Code sections 226.7 and 512(a);
11

12 B. Attorney fees and costs of suit; and
13

14 C. Such further relief as this Court deems just and proper.
15

16 X. ON THE TENTH CLAIM FOR RELIEF, IN FAVOR OF PLAINTIFFS
17 GOMEZ, DURAN-TOVAR, GALVAN, GARCIA-TOVAR, ANTONIO JIMENEZ,
18 VELAZQUEZ, MILLA, MILLAN, MILLAN-MARTINEZ, ROJAS AND THE
19 SUBCLASS OF TERMINATED EMPLOYEES ONLY, AGAINST EMPLOYER:
20

21 A. Judgment for one day's wages for each day from termination to payment,
22 up to a maximum of 30 days' wages per employee;
23

24 B. Attorney fees and costs; and
25

26 C. Such further relief as this Court deems just and proper.
27
28

1 XI. ON THE ELEVENTH TENTH CLAIM FOR RELIEF, AGAINST EMPLOYER
2 AND OWNER:

3
4 A. For an Accounting and Restitution of the difference between the wages
5 actually paid, and the wages required by law to be paid;

6
7 B. For a preliminary injunction and a permanent injunction enjoining
8 Defendants from employing workers without complying with California state wage
9 and hour laws including the prevailing wage laws; and

10
11 C. For attorney fees and costs of suit, pursuant to California Code of Civil
12 Procedure § 1021.5; and

13
14 D. Such further relief as this Court may deem just and proper.

15
16 ON ALL CAUSES OF ACTION:

17
18 For reasonable attorney's fees and costs of suit.

19
20 Respectfully Submitted,

21
22 Dated: August 6, 2008

ALEXANDER B. CVITAN,
J. DAVID SACKMAN, and
NATALIA BAUTISTA, Members of
REICH, ADELL & CVITAN
A Professional Law Corporation

23
24
25 By: Natalia Bautista
26 NATALIA BAUTISTA
Attorneys for Plaintiff
27
28

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury to the fullest extent permitted in this action,
including any claims by Defendants in this action.

Dated: August 6, 2008

ALEXANDER B. CVITAN,
J. DAVID SACKMAN, and
NATALIA BAUTISTA, Members of
REICH, ADELL & CVITAN
A Professional Law Corporation

By:



NATALIA BAUTISTA
Attorneys for Plaintiff

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Enedino Duran Gomez; et al. (see attached sheet)

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Alexander B. Cvitan, Esq., Reich Adell & Cvitan (see attached sheet)

DEFENDANTS

Rossi Concrete, Inc. (see attached sheet)

County of Residence of First Listed Defendant San Diego

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN HANDLING U.S. PLAINTIFF CASES, THE LOCATION OF THE

Attorneys (If Known)

08 CV 1442 BTM CAB

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	FEDERAL TAX SUITS <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):

29 U.S.C. Section 1132(a)(2)

Brief description of cause:

Violations of ERISA fiduciary duties over which this Court has jurisdiction

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/06/2008

SIGNATURE OF ATTORNEY OF RECORD

Nubelin Bautista

FOR OFFICE USE ONLY

RECEIPT #

153805

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

SAC 8/8/08

Civil Cover Sheet Continuation

I. (a) PLAINTIFFS

ENEDINO DURAN GOMEZ; GERARDO DURAN TOVAR; REYNALDO GALVAN; OSCAR GARCIA-TOVAR; ZACARIAS GUTIERREZ MILLA; ALVARO JUAN JIMENEZ; ANTONIO JIMENEZ; ANDRES MILLAN; JUAN MILLAN-MARTINEZ; BENITO ROJAS; RAFAEL VELAZQUEZ, and a Class of similarly-situated employees and participants

DEFENDANTS

ROSSI CONCRETE, INC., a California Corporation; JOSEPH JAMES ROSSI, an individual; ROSSI CONCRETE, INC. DEFINED BENEFIT PENSION PLAN, an employee pension benefit plan

(c) Attorney's (Firm Name, Address and Telephone Number)
Alexander B. Cvitan, Esq.
J. David Sackman, Esq.
Natalia Bautista, Esq.
REICH, ADELL & CVITAN, A PLC
3550 Wilshire Blvd., Suite 2000
Los Angeles, CA 90010

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

153805 - TC

**August 08, 2008
10:24:12**

Civ Fil Non-Pris

USAO #: 08CV1442

Judge.: BARRY T MOSKOWITZ

Amount.: \$350.00 CK

Check#: BC2195

Total-> \$350.00

**FROM: ENEDINO DURAN GOMEZ
VS
ROSSI CONCRETE**